



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 4, 2003

Ms. Jennifer A. Soffer
Assistant General Counsel
Texas State Board of Medical Examiners
P.O. Box 2018
Austin, Texas 78768-2018

OR2003-2273

Dear Ms. Soffer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178798.

The Texas State Board of Medical Examiners (the "board") received a request for the requestor's hearing records. The board received another request from the same requestor seeking the certified agendas of the three board meetings relating to discussions of her cases.¹ You claim that the information responsive to the requestor's requests is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

We first address the board's obligations under section 552.301 of the Government Code. Subsections 552.301(a) and (b) of the Public Information Act (the "Act") provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

¹ We note that the requestor also references additional requests for information she has made to the board. However, the board has not asked for a decision from this office on any other requests, and therefore, we do not address any other requests. *See* Gov't Code § 552.301(a), (b).

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Further, section 552.301(e) provides that a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

You state that you received the request for the hearing records on August 16, 2000. Therefore, the board had until ten business days following its receipt of that request to request a decision from this office regarding the requested information, and until fifteen business days following its receipt of that request to submit the items of information required to be submitted to this office under section 552.301(e) of the Government Code. Upon receiving correspondence from this office regarding a complaint from the requestor, you asked for a decision on January 29, 2003 as to whether the information at issue is excepted from disclosure. Thus, as you acknowledge, you failed to request a decision from this office in accordance with section 552.301. However, you state that in withholding the requested information, the board relied on "previous determinations" of this office on requests for opinions that the board determined were substantially similar to the present request.

We note that there are two types of previous determinations that may exist under section 552.301(a). The first type of previous determination requires that all of the following criteria be met:

1. the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code;
2. the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general;
3. the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and

4. the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling.

Open Records Decision No. 673 at 6-7 (2001). “This first instance of a previous determination does not apply to records that are substantially similar to records previously submitted to this office for review, nor does it apply to information that may fall within the same category as any given records on which this office has previously ruled.” *Id.* at 6. The second type of previous determination requires that all of the following criteria be met:

1. the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision;
2. the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested;²
3. the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act;
4. the elements of law, fact, and circumstances are met to support the previous decision’s conclusion that the requested records or information at issue is or is not excepted from required disclosure; and³

² Previous determinations of the second type can apply to all governmental bodies if the decision so provides. *See, e.g.*, Open Records Decision No. 670 (2001) (concluding that all governmental bodies subject to the Act may withhold information that is subject to section 552.117(2) of the Government Code without the necessity of seeking a decision from this office). The second type of previous determination can also apply to all governmental bodies of a certain type. *See, e.g.*, Open Records Decision No. 634 (1995) (applying to any governmental body that meets the definition of an “educational agency or institution” as defined in the federal Family Educational Rights and Privacy Act, *see* 20 U.S.C. § 1232g(a)(3)). On the other hand, if the decision is addressed to a particular governmental body and does not explicitly provide that it also applies to other governmental bodies or to all governmental bodies of a certain type, then only the particular governmental body to which the decision is addressed may rely on the decision as a previous determination. *See, e.g.*, Open Records Decision No. 662 (1999) (constituting the second type of previous determination but only with respect to information held by the Texas Department of Health).

³ Thus, in addition to the law remaining unchanged, the facts and circumstances must also have remained unchanged to the extent necessary for all of the requisite elements to be met. As with the first type of previous determination, a governmental body seeking to withhold requested information must make an initial finding that it in good faith reasonably believes the information is excepted from disclosure. With respect to previous determinations of the second type, a governmental body should request a decision from this office if

5. the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

Id. at 7-8. "Absent all of the above criteria for one of the two types of previous determinations, a governmental body must ask for a decision from this office if it wishes to withhold from the public information that is requested under the Act." *Id.* at 8. Neither type of previous determination exists that is applicable to the requested information. Thus, your reliance on prior rulings issued by this office was misplaced and does not negate the fact that you failed to comply with section 552.301 in requesting this decision from us. *See* Gov't Code §§ 552.021, .301, .302.

Pursuant to section 552.302, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). The application of section 552.101 of the Government Code can provide a compelling reason for overcoming the presumption of openness. *See* Open Records Decision No. 150 (1977). Thus, we address your arguments under this exception.

You claim that the submitted investigative records are excepted under section 552.101 in conjunction with section 164.007(c) of the Occupations Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. Section 164.007(c) provides the following:

(c) Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding is

it is unclear to the governmental body whether all of the elements on which the previous decision's conclusion was based have been met with respect to the requested records or information.

privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board.

Occupations Code § 164.007(c). Section 164.007(c) applies to investigatory records gathered by the board during an investigation of a license holder. You indicate that the submitted information constitutes the board's investigative file relating to the requestor's complaint against a licensed physician. Based on your representation, we conclude that the submitted records constitute investigative information possessed by the board relating to a license holder. Accordingly, you must withhold this information under section 552.101 in conjunction with section 164.007(c) of the Occupations Code.

Further, you indicate that some of the requested information arose from lawfully closed executive sessions held under the Open Meetings Act (the "OMA"). A governmental body that conducts a closed meeting must keep either a certified agenda or make a tape recording of the proceeding, except for private attorney consultations. Gov't Code §551.103. The agenda or tape is kept as potential evidence in litigation involving an alleged violation of the OMA. *See* Attorney General Opinion JM-840 (1988). Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3)*" (emphasis added). Section 551.146 penalizes the unlawful disclosure of a certified agenda or tape recording of a lawfully closed meeting as a Class B misdemeanor, and makes the person responsible for disclosure liable for damages to a person injured or damaged by the disclosure. Thus, such information cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988). In addition, minutes of a closed meeting are confidential. *See* Open Records Decision No. 60 (1974) (closed meeting minutes are confidential under the predecessor to section 551.104); *see also* Open Records Decision Nos. 563 (1990) (minutes of a properly held executive session are confidential under the OMA); Open Records Decision No. 495 (1988) (providing that information protected under predecessor to section 551.104 cannot be released to a member of the public in response to an open records request). Assuming that no court order has been issued with respect to the public inspection and copying of such information, we find that the certified agendas of the closed meetings must not be disclosed under section 552.101 in conjunction with section 551.104 of the Government Code.

You request that this office issue previous determinations to categorically encompass the types of investigative records and agendas that were requested. You also request that the board be allowed to apply such previous determinations retroactively. In light of the board's history of noncompliance with the Act in responding to such requests for information, we decline to issue such determinations at this time, whether to be retroactively applied or applied to future requests.⁴ Accordingly, this letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

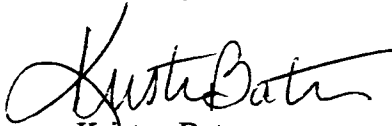
⁴ We further note that the administrative inconvenience of providing public records is not a ground for refusal to comply with the Act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 178798

Enc. Submitted documents

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